92-1487
NO.

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

CLEO ALLEN BUTLER, ET AL.
PETITIONERS

VERSUS

JEROME T. MEDLEY, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

JAMES L. YATES, ESQ.
631 St. Charles Avenue
New Orleans, LA 70130

(504) 523-4497

DARLEEN M. JACOBS,
ESQ.
COUNSEL OF RECORD
BRIAN C. BECKWITH, ESQ.
DARLEEN M. JACOBS
(A PROFESSIONAL LAW
CORPORATION)
823 St. Louis Street
New Orleans, Louisiana
70112
(504) 522-3287 & 522-0155
Counsel for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

Whether La.R.S. 40:1299.42(B), which limits the tort recovery of a medical malpractice victim to $500,000 exclusive of future medical costs, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Plaintiffs-Petitioners

Cleo Allen Butler, individually and for and on behalf of

Michelle Butler

Arlene Major, as custodian of Michelle Butler

Defendants-Respondents

Jerome T. Medley, M.D.

Warren P. McKenna, M.D.

Joseph P. Braud, M.D.

Louisiana Patient's Compensation Fund

Former Defendants Flint Goodridge Hospital and Sandra Viglia reached a settlement with petitioners and were dismissed from this action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

ARGUMENT 9

I. LA.R.S. 40:1299.42(B) SHOULD BE REVIEWED UNDER A HEIGHTENED STANDARD OF SCRUTINY 9

II. LA.R.S. 40:1299.42(B) IS UNCONSTITUTIONAL WHEN REVIEWED UNDER HEIGHTENED SCRUTINY 12

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 3, 12

STATUTES

42 U.S.C. § 12101(a)(7) 3, 11

42 U.S.C. § 12101(b)(4) 3, 12

42 U.S.C. § 12102(2) 4

42 U.S.C. §§ 12101-12213 10

La.R.S. 40.1299.44(C)(5) 6

La.R.S. 40:1299.42(B) 1, 6, 8, 9, 12, 16

CASES

Boyd v. Bulala,
877 F.2d 1191 (4th Cir. 1989) 10

Brannigan v. Usitalo,
587 A.2d 1232, 1236 (N.H. 1991) 14

Carson v. Maurer,
424 A.2d 825 (N.H. 1980) 14, 16

City of Cleburne, Texas v. Cleburne Living Center,
473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257,
87 L.Ed.2d 313, 324 (1985) 11

Davis v. Omitowoju,
883 F.2d 1155 (3d Cir. 1989) 10

Fein v. Permanente Medical Group,

474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985) 12

Hoffman v. United States,
767 F.2d 1431 (9th Cir. 1985) 10

Katzenbach v. Morgan,
384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) 12

LaMark v. NME Hospitals, Inc.,
542 So.2d 753, 755-56 (La.App. 4th Cir. 1989),
writ denied, 551 So.2d 1334 (La. 1989) 13

Lucas v. United States,
807 F.2d 414 (5th Cir. 1986) 10

Lyng v. Castillo,
477 U.S. 635, 638, 106 S.Ct. 2727, 2729,
91 L.Ed.2d 527, 533 (1986) 11

Massachusetts Board of Retirement v. Murgia,
427 U.S. 307, 313, 96 S.Ct. 2562, 2567,
49 L.Ed.2d 520, 525 (1976) 11

Moore v. Mobile Infirmary Association,
592 So.2d 156 (Ala. 1991) 14-16

Morris v. Savoy,
576 N.E.2d 765 (Ohio 1991) 15, 16

Sibley v. Board of Supervisors of Louisiana State University,
462 So.2d 149 (La. 1985),
on rehearing, 477 So.2d 1094 (La. 1985) 7-9

United States v. Carolene Products Co.,
304 U.S. 144, 153 n.4, 58 S.Ct. 778, 783 n.4,
82 L.Ed. 1234, 1241 n.4 (1938) 11

Williams v. Kushner,
524 So.2d 191 (La.App. 4th Cir. 1988),

aff'd as amended, 549 So.2d 294 (La. 1989) 7, 8, 13

OPINIONS BELOW

The judgment of the Civil District Court for the Parish of Orleans denying respondents' motion for summary judgment and the judgment of the Fourth Circuit Court of Appeal, State of Louisiana, granting writs and reversing the Civil District Court, will not be reported. The opinion of the Supreme Court of Louisiana affirming the Fourth Circuit Court of Appeal has not yet been reported. Copies of these judgments are contained in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on October 19, 1992. Petitioners' application for rehearing was denied on November 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the constitutionality of La.R.S. 40:1299.42(B) with respect to the equal protection clause of the Fourteenth Amendment of the United States Constitution. La.R.S. 40:1299.42(B) reads as follows:

> (1) The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.
>
> (2) A health care provider qualified under this Part is not liable for an amount in excess of one

hundred thousand dollars plus interest thereon accruing after April 1, 1991, for all malpractice claims because of injuries to or death of any one patient.

(3)(a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C).

(b) The total amounts paid in accordance with Paragraphs (2) and (3) of this Subsection shall not exceed the limitation as provided in Paragraph (1) of this Subsection.

The relevant portions of the Fourteenth Amendment read as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5. Also at issue is the effect of certain provisions contained in the Americans with Disabilities Act, as follows:

(a) Findings. The Congress finds that —

* * *

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . .

42 U.S.C. § 12101(a)(7).

(b) Purpose. It is the purpose of this Act —

* * *

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)(4).

Disability. The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

STATEMENT OF THE CASE

This case is one in medical malpractice. On or about May 19, 1976, the minor child, Michelle Butler (then aged three) was admitted to Flint-Goodridge Hospital of Dillard University in New Orleans for a relatively minor surgical procedure, the excision of a granuloma from the child's right upper eyelid. This procedure was performed by respondents Drs. Medley and McKenna, who were assisted by an anesthesiologist, respondent Dr. Braud. Following the procedure, the physicians left the operating room before the patient was extubated. Extubation was attempted by a nurse-anesthesiologist, Sandra Viglia, without the assistance of a qualified anesthesiologist or other medical doctor, and without proper life-saving emergency support systems and monitoring devices. Upon extubation, Michelle Butler had a cardiac arrest and, due to the defendants' acts of malpractice, the child was rendered blind, deaf, paralyzed and mentally retarded. Michelle Butler is now a major.

The present suit was initiated following a medical review panel decision which found Dr. Braud to have been negligent. The requirement that medical malpractice claims must be presented to medical review panels prior to litigation is one aspect of Louisiana's Medical Malpractice Act. The issue presented in this petition is the constitutionality of another portion of the Act which limits the recovery for any medical malpractice claimant to $500,000, exclusive of future medical care, and limits the liability of qualified health care providers to $100,000 for any one malpractice claim. During the long pendency of this suit, numerous procedural events have occurred, only some of which are relevant to the issues presented for review by this Court. Two of the defendants, Flint Goodridge Hospital of Dillard University and its employee, nurse-anesthesiologist Sandra Viglia, were released from the suit in a compromise confected prior to Flint Goodridge's bankruptcy. This compromise was for the sum of $100,000. Petitioners specifically reserved all rights they

may have against respondents, Drs. McKenna, Medley and Braud, and their respective insurers.

Following the compromise with Flint Goodridge Hospital and Sandra Viglia, the Louisiana Patient's Compensation Fund conceded liability on behalf of the settling defendants, and confessed judgment in favor of petitioners in the amount of $400,000 in addition to interest and costs. Under the Medical Malpractice Act, the liability of a health care provider is considered admitted and established where the insurer has paid its policy limits of one hundred thousand dollars, or where the self-insured health care provider has paid one hundred thousand dollars. La.R.S. 40.1299.44(C)(5). Petitioners refused to accept this sum by way of compromise, and the funds were placed in the registry of the trial court. Petitioners refused to accept these funds because they did not wish to jeopardize recovery against the Patient's Compensation Fund for independent acts of malpractice by Drs. McKenna, Medley and Braud.

Respondents McKenna, Medley and Braud then filed motions for summary judgment on the basis of the $500,000 statutory limit on recovery for medical malpractice actions against qualified health care providers. Respondents argued that because they were qualified health care providers, they were entitled to the protection of the statutory recovery limit, and that a trial would be pointless since petitioners had received or been proffered the statutory maximum —$100,000 from the compromise with Flint Goodridge Hospital and Sandra Viglia, and $400,000 deposited by the Patient's Compensation Fund into the registry of the court.

Petitioners opposed the motions for summary judgment on the grounds that the $500,000 recovery limitation found in La.R.S. 40:1299.42(B) is unconstitutional. Petitioners' constitutional objections were included in the petition (demand) filed in the trial court. In particular, the Second Supplemental and Amending Petition states, "L.R.S. 40:1299.42(B)(1) and (2) violates the Equal Protection Clauses of the United States and Louisiana Constitutions and deprives the plaintiff's minor daughter [Michelle

Butler] of equal protection of the laws. . . ." Partly because the trial court was awaiting guidance from higher courts on the constitutionality of the recovery limitation, decision on the motions for summary judgment was delayed until 1991.

Initially, the trial court deferred action on the motions due to the pendency in the Supreme Court of Louisiana of *Sibley v. Board of Supervisors of Louisiana State University*, 462 So.2d 149 (La. 1985), *on rehearing*, 477 So.2d 1094 (La. 1985). *Sibley* considered the constitutionality of the statute which limits the state's liability to $500,000.00 in any medical malpractice action. While a decision on the constitutionality of that statute might have provided some guidance with respect to the constitutionality of the recovery limitation for private qualified health care providers at issue in the present suit, the action in *Sibley* was remanded after rehearing without a determination of whether the statute was constitutional.

The summary judgment motions were again held in abeyance while the case of *Williams v. Kushner*, 524 So.2d 191 (La.App. 4th Cir. 1988), *aff'd as amended*, 549 So.2d 294 (La. 1989), was pending. The plaintiffs in *Williams* challenged the constitutionality of the same statute at issue in the present action, but the Supreme Court of Louisiana decided *Williams* without finding it necessary to reach the constitutional questions. Again, the trial court did not receive the guidance for which it was waiting.

The matter remained in abeyance until the original trial judge, the Honorable Thomas Early of the Civil District Court, Parish of Orleans, removed himself from the case. In his place, the Honorable Preston Hufft was appointed a judge ad hoc to conduct all further proceedings.

Following his appointment, Judge Hufft conducted a hearing on the motions for summary judgment. A judgment was rendered denying the motions for summary judgment on December 13, 1991. At no time prior to this judgment had there ever been a determination of the liability of Drs. McKenna, Medley or Braud; there had never been any evidentiary hearing or call for briefs or memoranda on the constitutional issues raised by petitioners. The only "consideration" of these claims

occurred as an adjunct to the hearing on the motions for summary judgment. In a well-reasoned opinion denying summary judgment, Judge Hufft determined that the moving respondents had not met their burden to show that they were entitled to summary judgment. He also found that the issue of the constitutionality of the $100,000 liability limitation for individual health care providers had not been resolved by either *Sibley* or *Williams*, and found that the constitutional issues were not ripe for adjudication prior to trial on the merits and a decision on liability and damages.

After being rebuffed in the trial court, respondents McKenna, Medley and Braud made application to the state Fourth Circuit Court of Appeal under its supervisory jurisdiction, seeking a reversal of the denial of summary judgment. Petitioners supported the trial court's decision that trial must be had on the substantive issues raised in the case, and that the constitutional issues could not be raised summarily. In the alternative, petitioners presented arguments on the constitutional issues themselves. On pages 4-11 of their Original Memorandum in Opposition to Writ Applications, petitioners argued that the medical malpractice damages cap violates the equal protection clauses of both the United States and Louisiana Constitutions.

In a decision rendered on February 3, 1992, the Fourth Circuit Court of Appeal exercised its supervisory jurisdiction and granted the respondents' writ application. A judgment was rendered in favor of respondents, dismissing all further proceedings against them. The Court of Appeal panel specifically held that all questions of the constitutionality of the recovery and liability limitations in La.R.S. 40:1299.42(B) were decided by that court in *Williams*, 524 So.2d 191 (La.App. 4th Cir. 1988), and that any further review of these constitutional issues must come from the Supreme Court of Louisiana. There was no petition for rehearing.

Petitioners then applied for writs with the Supreme Court of Louisiana to review the decision of the Fourth Circuit Court of Appeal. The writ application included

Specification of Error No. 4 which stated, "The Court of Appeal erred in not holding that the recovery limitations violate the Federal Constitutional guarantees of equal protection and due process of law." Writs were granted, and after briefing and argument the Supreme Court of Louisiana affirmed the judgment of the Court of Appeal in an opinion entered on October 19, 1992. The Court held that La.R.S. 40:1299.42(B) is valid and violates neither the Louisiana nor the United States Constitution. Petitioners' application for rehearing was denied on November 25, 1992.

ARGUMENT

I. LA.R.S. 40:1299.42(B) SHOULD BE REVIEWED UNDER A HEIGHTENED STANDARD OF SCRUTINY

Petitioners ask this Court to declare unconstitutional the statutory limits placed on the liability of qualified health care providers and on the total recovery available to victims in medical malpractice actions under La.R.S. 40:1299.42(B). This statutory scheme is fundamentally unfair to the citizens of Louisiana, all of whom are potential victims of negligent medical care, and is manifestly unfair to Michelle Butler, who has been denied just compensation for her grievous injuries, compensation she would have received if her injuries had been the result of a tort other than medical malpractice. The basic flaw in the liability and recovery limitations placed on medical malpractice actions is that they attempt to regulate malpractice insurance rates by placing the burden of inadequate compensation on the most severely injured victims who are most in need of the compensation and least able to bear the burden. The statutory scheme governing medical malpractice thereby violates the standards of justice incorporated into the United States Constitution.

By limiting medical malpractice recovery to $500,000, the Louisiana legislature has denied full recovery to the most severely injured victims who are most in need

of compensation. The Supreme Court of Louisiana has held that the medical malpractice damages cap classifies individuals because of their physical condition. *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (La. 1985)(on rehearing). Michelle Butler's physical condition, her blindness, deafness, mental retardation and partial paralysis, requires compensation far in excess of $500,000, exclusive of medical costs. By limiting compensation, the legislature has disadvantaged Ms. Butler because of her physical condition, while allowing full recovery for those less severely injured who can be fairly compensated in an amount less than $500,000.

Such a classification based on physical condition is subject to special scrutiny under the express terms of the Louisiana Constitution. As will be discussed in the next section of this argument, the damages cap cannot withstand any form of heightened scrutiny. The Supreme Court of Louisiana maintained the validity of the cap only by employing the most cursory sort of rational basis review, ignoring the Louisiana Constitution and the Court's own precedents. While this Court cannot correct the errors below with respect to the Louisiana Constitution, petitioners submit that the United States Constitution also requires heightened scrutiny of statutes which classify citizens according to physical condition.

The United States Congress, as part of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, issued certain findings concerning persons with physical disabilities. The findings, if accepted by this Court, would require that Michelle Butler and others with physical disabilities be considered members of a "suspect class" for purposes of equal protection analysis. The Louisiana medical malpractice damages cap, because it classifies persons according to physical disability, would then be subject to strict scrutiny rather than the deferential rational basis review which federal appellate courts have employed in deciding equal protection challenges to caps in other states. *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989)(applied rational basis test in upholding Virgin Islands $250,000 limit on noneconomic damages, later amended to

include economic damages, in medical malpractice actions); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989)(applied rational basis test in upholding Virginia $750,000 limit, later amended to $1,000,000 limit, on recovery in medical malpractice actions); *Lucas v. United States*, 807 F.2d 414 (5th Cir. 1986)(applied rational basis test in upholding Texas $500,000 limit on nonmedical damages in medical malpractice actions); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985)(applied rational basis test in upholding California $250,000 limit on noneconomic damages in medical malpractice actions).

Petitioners are aware that this Court has previously declined to rule that persons with disabilities display the characteristics of a suspect class. *See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 445-46, 105 S.Ct. 3249, 3257, 87 L.Ed.2d 313, 324 (1985). The characteristics of a suspect class include groups which may be defined as "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234, 1241 n.4 (1938); which exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, *Lyng v. Castillo*, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527, 533 (1986); and which have experienced unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities, such a history of purposeful unequal treatment, or such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520, 525 (1976). In the Americans with Disabilities Act, Congress has decided that these characteristics of a suspect class do, in fact, apply to persons with disabilities.

The Act includes a finding that:

> individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,

> based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. . . .

42 U.S.C. § 12101(a)(7). The term "disability" under the Act includes "physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). Malpractice victims such as Michelle Butler would certainly be "individuals with disabilities" under the Act. The designation of individuals with disabilities as a discrete and insular minority is clearly a call for heightened scrutiny under the federal scheme of equal protection analysis. These findings, promulgated after extensive hearings, review and analysis, are entitled to serious consideration by this Court. The findings are entitled to special deference in that they were promulgated under the powers granted to Congress in the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4); U.S. Const. amend. XIV, § 5. Congress should be granted some leeway on factual matters when it expands the reach of the equal protection guarantee of the Fourteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

The effect of the Americans with Disabilities Act on the constitutionality of statutes which adversely affect individuals with disabilities is an unresolved issue which petitioners believe this Court should decide. The Act had not been enacted when this Court was previously presented with a constitutional challenge to a state medical malpractice damages cap. *Fein v. Permanente Medical Group*, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985)(appeal from California Supreme Court decision upholding $250,000 limit on noneconomic damages dismissed for want of a substantial federal question). The passage of the Act has created a substantial federal question on the constitutionality of caps on damages. It should also be noted that the cap at issue in *Fein* applied only to noneconomic damages. The Louisiana cap applies to all

damages exclusive of future medical costs, and so a medical malpractice victim is not assured of recovering even all of her economic damages.

II. LA.R.S. 40:1299.42(B) IS UNCONSTITUTIONAL WHEN REVIEWED UNDER HEIGHTENED SCRUTINY

If any sort of heightened scrutiny is applied to La.R.S. 40:1299.42(B), the statute must be found unconstitutional. Whether it is the strict scrutiny standard requiring a statute to be necessary for the promotion of a compelling state interest, or the intermediate scrutiny standard requiring a substantial relationship to important government objectives, there is a balancing of interests. In marked contrast to the vital individual interest which has been excised by the medical malpractice recovery limitation, the proposed state interest is a speculative attempt at economic regulation.

The Louisiana legislature has decided that Michelle and other severely injured malpractice victims cannot receive full compensation because the payment of the compensation would cause too much disruption in the system of medical malpractice insurance which, in turn, would adversely affect the entire health care system. Petitioners ask this Court to hold that there is no connection between the limitation on medical malpractice damages and any benefit to the citizens of Louisiana sufficient to justify withholding compensation from precisely those victims who are most deserving.

The recovery limitation was intended to promote the availability of medical malpractice insurance at a reasonable cost, as well as to promote the availability and affordability of medical care for the citizens of Louisiana. *LaMark v. NME Hospitals, Inc.*, 542 So.2d 753, 755-56 (La.App. 4th Cir. 1989), *writ denied*, 551 So.2d 1334 (La. 1989); *Williams v. Kushner*, 524 So.2d 191, 195 (La.App. 4th Cir. 1988), *aff'd as amended*, 549 So.2d 294 (La. 1989). However, the connection between damage caps and the availability of either

malpractice insurance or medical care is based more on supposition than on facts. This view is corroborated by the fact that the existence of the recovery and liability limitations has not furthered the asserted purposes behind the limitations. Medical care is not more available or more affordable than it was prior to enactment of the limitations. As for malpractice insurance, an Insurance Commissioner for the State of Louisiana has testified that the malpractice insurance market had probably deteriorated since enactment of the damages cap.

Before the Supreme Court of Louisiana, the most detailed exposition of the supposed benefits of the recovery limitation was by the Louisiana Patients Compensation Fund. The brief below by the Fund set out testimony that some people felt the damages cap had "stabilized" the insurance market to the extent of slowing the number and severity of claims and that some people were able to obtain insurance who otherwise might have been without insurance. However, neither the Fund nor any of the other supporters of the recovery limitation set out the magnitude of these purported benefits with sufficient clarity to justify the conclusion that these benefits outweigh the manifest injustice of denying compensation to those who most clearly deserve it and need it.

The highest courts of other states have analyzed the interests at stake and concluded that limitations on recovery in medical malpractice actions are not justified. The New Hampshire Supreme Court has found a balancing test to be appropriate for an intermediate level of equal protection analysis. *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991), *citing*, *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). In *Carson*, the New Hampshire court was called upon to decide the constitutionality of a statute which limited recovery for non-economic loss to $250,000 in medical malpractice actions. The court declared the statute invalid under the equal protection provisions of the New Hampshire Constitution. The court examined the interest of the individuals affected by the recovery limitation and stated, "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon

those persons who are most severely injured and therefore most in need of compensation." *Id.* at 837. In *Brannigan*, the court used the same reasoning to strike down a statute which limited damages recoverable for non-economic loss in any type of personal injury action to $875,000. 587 A.2d at 1233.

More recently, the Alabama Supreme Court has relied in part on the equal protection provisions of that state's constitution to invalidate a $400,000 limit on non-economic damages in medical malpractice cases. *Moore v. Mobile Infirmary Association*, 592 So.2d 156 (Ala. 1991). The court declared the proper standard of analysis to be whether the limit on damages was "reasonably related to the stated objective, and on whether the benefit sought to be bestowed upon society outweighs the detriment to private rights occasioned by the statute." 592 So.2d at 166. The cited objective and benefit of the limit on damages was to help control the increasing costs of health care and to insure its continued availability.

The court in *Moore* reviewed a series of reports published by the United States General Accounting Office concerning the effect on malpractice insurance of the various statutory reforms enacted in response to the escalation of insurance costs of the 1970's. 592 So.2d at 167-68. The court concluded that any connection between the statutory damages cap and the reduction of health care costs was, at best, indirect and remote because "the size of claims against health care providers represents but one among many elements composing the cost of malpractice premiums, which, in turn, represent only a small component of the total burden borne by health care consumers." 592 So.2d at 169. The statutory cap was declared invalid because the statute, "by balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of the police power." 592 So.2d at 170.

The Ohio Supreme Court has used the same line of reasoning set out in the New Hampshire and Alabama cases

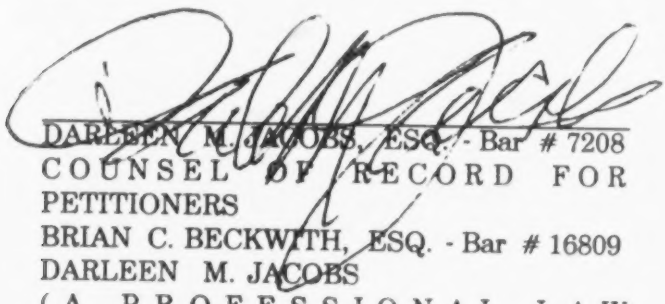
in order to strike down a $200,000 cap on general damages that may be awarded for medical malpractice. *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991). The Ohio court relied on that state's due process clause, but the standard of review was similar to an intermediate standard of equal protection analysis. The standard of review was described as being a determination of whether the challenged statute bears a real and substantial relationship to public health or welfare or whether it is unreasonable or arbitrary. 576 N.E.2d at 770. *Morris* states that the court could find no evidence of a substantial relationship, or even a rational connection, between the $200,000 cap and the control of malpractice insurance rates. In support of its conclusion, the court cited a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, which "found that the savings from various tort reforms, including a $250,000 cap on noneconomic damages, were 'marginal to nonexistent.'" 576 N.E.2d at 771. In addition, the $200,000 cap was held to be unreasonable and arbitrary because it imposed the cost of the intended benefit to society solely upon a class consisting of those most severely injured by medical malpractice. *Id.*

In the present case, as in *Carson*, *Moore* and *Morris*, the balance of interests is clearly in favor of the individual's real need for compensation and against the state's interest in experimenting with economic regulation in the field of medical malpractice insurance. The individual interest, Michelle Butler's interest, is in receiving just compensation for the catastrophic injury she has suffered. The idea of just compensation is central to the system of tort law which is the only source of recovery for the victims of medical malpractice. Michelle Butler has lost the ability to perceive the world and to communicate with others in the manner we take for granted. She has lost the ability to support herself through meaningful employment. Her interest in receiving full compensation is real, tangible and compelling. When a statute singles out those who have suffered most, those most in need of the state's protection, and denies them adequate compensation, that statute is contrary to elementary justice.

CONCLUSION

For the reasons stated above, petitioners ask that this Court grant a writ of certiorari in order to review the judgment of the Supreme Court of Louisiana in this action. La.R.S. 40:1299.42(B) discriminates on the basis of physical disability by denying full compensation to the most severely injured medical malpractice victims. The statute thereby violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Should this petition for a writ of certiorari be granted, petitioners ask that the statute be declared unconstitutional and that this action be remanded for further proceedings so that Michelle Butler may receive just compensation for her injuries.

Respectfully submitted,



DARLEEN M. JACOBS, ESQ. - Bar # 7208
COUNSEL OF RECORD FOR PETITIONERS
BRIAN C. BECKWITH, ESQ. - Bar # 16809
DARLEEN M. JACOBS
(A PROFESSIONAL LAW CORPORATION)
823 St. Louis Street
New Orleans, Louisiana 70112
(504) 522-3287 & 522-0155

OF COUNSEL:

JAMES L. YATES, ESQ. - # 19841
631 St. Charles Avenue
New Orleans, Louisiana 70130
(504) 523-4497